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GROUPION, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GROUPION, LLC a California limited liability
company,

Plaintiffs,

vs.

GROUPON, INC., a Delaware corporation,
THE POINT, INC., a Delaware corporation, and,
GOOGLE, INC., a Delaware corporation,

Defendants.

Case No. 3:2011-cv-00870-JSW

**PLAINTIFF GROUPION, LLC'S OPPOSITION
TO DEFENDANT GROUPON, INC.'S
OBJECTION TO REPLY EVIDENCE
AND ADMINISTRATIVE MOTION
FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF IN
OPPOSITION OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REQUEST FOR
PRELIMINARY INJUNCTION**

Before: The Hon. Jeffrey S. White
Date filed: September 14, 2011

TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Groupion, LLC (“GROUPION”) hereby opposes Defendant Groupon, Inc.’s (“GROUPON”) Administrative Motion for Leave to File Supplemental Brief in Opposition to Plaintiff’s Motion for Summary Judgment and Request for Preliminary Injunction, and submits the following Points and Authorities in support thereof.

ARGUMENT**I. PLAINTIFF GROUPION PRESENTED NO NEW ARGUMENTS AND LIMITED ADDITIONAL REPLY EVIDENCE**

Under Civil Local Rule 7-3, a “reply may include affidavits or declarations, as well as a supplemental brief or memorandum under Civil L.R. 7-4.” The Ninth Circuit explained the permissible scope of reply briefings in Rule 56 motions in Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001):

The gist of a summary judgment motion is to require the adverse party to show that it has a claim or defense, and has evidence sufficient to allow a jury to find in its favor on that claim or defense. The opposition sets it out, and then the movant has a fair chance in its reply papers to show why the respondent's evidence fails to establish a genuine issue of material fact (emphasis added).

Thus, responsive arguments – in addition to reply affidavits and declarations – are appropriate in reply briefs, as long as they are targeted at giving Plaintiff a “fair chance” to reply to GROUPON’s arguments.

Here, Plaintiff submitted two terse supplemental declarations to support its Reply brief: First, the declaration of witness Thomas Kuhlenkamp, one of Plaintiff’s customers attesting to consumer confusion. A virtually identical statement by Mr. Kuhlenkamp was previously submitted attached to GROUPION co-founder Peter Haider’s Declaration in support of Plaintiff’s Motion. (See Haider Decl., Exh.17). GROUPON objected to Mr. Kuhlenkamp’s original statement not on any substantive basis, but because it was, in GROUPON’s words, “unsworn and (inadmissible)...” In response, Plaintiff submitted a *sworn* affidavit by Mr. Kuhlenkamp in its Reply – which, with the exception of a few corrected typos (as the original statement was drafted by Mr. Kuhlenkamp, a non-native English speaker), is identical to the one originally submitted.

1 The second supplemental declaration – by GROUPION co-founder Benjamin Coutu –
 2 concerned two limited subjects. *First*, it attached as an exhibit the “Groupon Change Log,” the
 3 technical change log listing each version of the “Groupon” software released chronologically and the
 4 changes made thereto. The Change Log was also attached to GROUPON Counsel Jedediah
 5 Wakefield’s Declaration (as Exhibit 4) in support of GROUPON’s Opposition, so it is not new
 6 evidence.

7 The *second* subject of Mr. Coutu’s Supplemental Declaration was a statement by Mr. Coutu
 8 to impeach GROUPON’s misleading statements about its software and related services as shown by
 9 Mr. Coutu’s review of the numerous published GROUPON software engineering and development
 10 employment positions that GROUPON now advertises and attached screen-shots of several job
 11 advertisements as illustrative exhibits. This evidence was in reply to GROUPON’s repeated (and
 12 misleading) assertions that it does not develop or market software. (See *e.g.*, Declaration of Nick
 13 Cioffi in Support of Defendant Groupon’s Opposition (“Cioffi Decl.”), Para. 54 [“Groupon does not
 14 offer CRM software of any kind...” [and] “we have no plans to offer commercial software...”]).
 15 Thus, this limited additional evidence was relevant and limited to GROUPON’s Opposition
 16 arguments.

17 In summary, the *additional* evidence submitted by Plaintiff in its reply was (1) a declaration
 18 (by Mr. Kuhlenkamp) under oath that is substantively identical to his previously submitted statement;
 19 (2) the “Change Log” (as an exhibit) already contained in GROUPON counsel’s previous declaration;
 20 and, (3) published GROUPON job advertisements, which impeach GROUPON’s Opposition. This
 21 type of reply brief evidence is unambiguously authorized under case law and the Federal Rules of
 22 Civil Procedure (and Civil Local Rules) and obviously justifies no supplemental briefing.

23 **II. PLAINTIFF HAS NO GROUNDS FOR SUPPLEMENTAL BRIEFING**

24 On September 13, 2011, Plaintiff counsel Jack Russo received notice that GROUPON
 25 requested a stipulation to file supplemental briefing. For the reasons above, Plaintiff counsel
 26 declined to stipulate by explaining that “Groupon did not submit any new evidence or arguments in
 27 its brief – it replied specifically to the arguments made by Groupon and provided two short
 28 supporting declarations. Under these circumstances, no additional briefing is required (or even

1 allowed) under the Federal Rules of Civil Procedure or Civil Local Rules.” (See, Declaration of Jack
2 Russo in Support of Opposition to GROUPON’s Admin. Motion to File Supp. Brief).

3 GROUPON’s subsequent characterization of Plaintiff’s Reply as “sandbagging”¹ is entirely
4 unfounded for at least three reasons. First, as noted, two short supplemental declarations responding
5 to specific points in GROUPON’s Opposition do not constitute “sandbagging” nor do they provide
6 grounds for supplemental briefing under the applicable law or common sense. Second, Reply
7 declarations are allowed under statutory and case law and are clearly a permissible way to present
8 reply arguments. Third, Plaintiff’s reply arguments are not *new* – they were all either originally
9 discussed in Plaintiff’s Motion (and appropriately revived) or made in response to GROUPON’s
10 arguments; indeed, all *three* of Plaintiff’s reply arguments complained of by GROUPON were
11 responsive to GROUPON’S Opposition, as shown in the following.

12 **A. Trademark Priority Is Established By Public Trademark Registration Records.**

13 GROUPON complains that Plaintiff’s argument regarding trademark priority under Sec. 44 of
14 the Lanham Act is “new” (See Admin. Motion to File Supp. Brief, 2:24 – 3:5). This is clearly
15 incorrect – Plaintiff’s original Motion specifically referenced and discussed its Section 44 trademark
16 priority and made the same argument in its original Motion (See, *e.g.*, Plaintiff’s Motion for
17 Summary Judgment, 19:28-20:4: “Any superficial research on GROUP*ON should and would have
18 revealed that there was already an Internet-driven business using this brand-name and a trademark
19 registration in the European Union which has priority under settled U.S. Treaty Law under Section
20 44(d) of the Lanham Act”). The Reply simply impeaches Groupon’s Opposition.

21 **B. Software By Groupon Has Always Been The Issue.**

22 GROUPON argues that Plaintiff offered “new” evidence regarding GROUPON’s current
23 attempts to expand its trademark coverage (specifically, “Groupon Now”) into *software*. (See,
24 Admin. Motion to File Supp. Brief, 3:6-15). To the contrary, Plaintiff’s argument regarding
25 “Groupon Now” responds to the Declaration of Nick Cioffi (GROUPON V.P. of Global Operations)
26
27

28 ¹ See GROUPON’s Admin. Motion to File Supp. Brief, 2:5.

1 where he specifically references and describes the “Groupon Now” service,² and concomitantly
 2 asserts that “Groupon has never offered marketing campaign software of any kind...”³ It is clearly
 3 appropriate and responsive to Mr. Cioffi’s declaration to point out that GROUPON has “recently
 4 amended its [Groupon Now] trademark application claims to specifically include **‘software’ goods**
 5 **designed to ‘arrange’ online sales and advertising campaign for other companies.’**” (See,
 6 Plaintiff’s Reply Brief, 12:7-11).

7 **C. Groupon Is Impeached By Its Own Public Statements.**

8 GROUPON attempts to characterize Plaintiff’s evidence of GROUPON’s current recruitment
 9 of software engineers and developers as a “new” argument. (See, Admin. Motion to File Supp. Brief,
 10 3:16-22). Again, Plaintiff’s argument was and is made in response to the *same* dubious and repeated
 11 Opposition arguments by GROUPON (and in Mr. Cioffi’s declaration) that GROUPON has “no
 12 plans to offer commercial software...”⁴, which is contradicted by GROUPON’s aggressive recruiting
 13 of software engineers and developers. Thus, Plaintiff’s argument – and specific impeachment
 14 evidence – is entirely suitable under statutory and case law in responding to such arguments.

15 **CONCLUSION**

16 GROUPON’s Administrative Motion for Leave to File Supplemental Briefing is a readily-
 17 apparent attempt to “get the last word.” If GROUPON had its way, briefing on this Motion could
 18 and would continue *ad infinitum*. Plaintiff has submitted no new arguments and only limited
 19 impeachment evidence specifically addressed to GROUPON’s Opposition arguments. In these
 20 circumstances, **no** new briefing is allowed (nor should it be allowed). Accordingly, Plaintiff
 21 respectfully submits that GROUPON’s motion for supplemental briefing should be DENIED.

22 Dated: September 14, 2011

Respectfully submitted,
 COMPUTERLAW GROUP LLP

23 By: /s/ Jack Russo

24 Jack Russo
 25 Attorney for Plaintiff GROUPION LLC

27 ² See Cioffi Decl., Para 29.

28 ³ See GROUPON’s Opposition to Motion for Summary Judgment, 11:9.

⁴ See Cioffi Decl., Para 54.